

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Robert Kwan, Presiding
Courtroom 1675 Calendar**

Friday, January 21, 2022

Hearing Room 1675

10:00 AM

2:00-00000

Chapter

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Docket 0

Tentative Ruling:

- NONE LISTED -

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2:13-14135 Art and Architecture Books of the 21st Century and 400 S.

Chapter 11

#1.00 TRIAL RE: to resolve disputed issues of material fact on the plan's agent's motion to show cause fr. 12/15/21, 1/6/22

Docket 2676

Tentative Ruling:

No updated tentative ruling as of 1/12/22. Appearances are required on 1/21/22, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Prior tentative ruling as of 1/5/22. Sustain objections of Douglas Christmas to the declaration of Victor Sahn on grounds of best evidence and as argumentative. The Sahn declaration is not objectionable on grounds of lack of disclosure because it is filed in substantial compliance with the trial scheduling order of 12/15/21 as the witness was disclosed by the filing of his declaration before the 12/24/21 deadline. The substance of the declaration, however, is objectionable as disguised legal argument in interpreting certain documents filed in this bankruptcy case, which presents best evidence and argumentative issues. The court will consider the Sahn declaration as further legal argument on behalf of the plan agent, and will take judicial notice of the documents filed in the case as identified in the declaration. However, the testimony in the declaration is inadmissible as substantive evidence, and there will be no live cross or redirect examination of the witness permitted.

Regarding the merits, it appears that the gist of the argument of Douglas Christmas is that he never transferred ownership of the pre-1999 (i.e., preformation) posters to the debtor, stating in his declaration that there is no written documentation that he or his other companies transferred the posters to the debtor and his representations in the valuation declaration filed in support of debtor's adequate protection motion in this case was not "sufficiently explained" (i.e., mistaken).

It appears that the gist of the argument of the plan agent that the debtor owns

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the pre-1999 posters is based on admissions of Christmas in statements made in documents filed in this bankruptcy case (i.e., the valuation declaration, the bankruptcy schedules, plan confirmation documents) that constitute judicial estoppel or judicial admissions that debtor owns the posters. In the court's view, the evidentiary record is insufficient as to how debtor came to own the posters as there is no documentary evidence showing debtor's acquisition through purchase or otherwise. It appears that there is no dispute that the posters were owned by Christmas or his other companies, who first acquired the posters, and that the plan agent is asking the court to find that he transferred the posters to the debtor, possibly as a capital contribution or a gift. If debtor acquired the posters from Christmas, there must have been some transfer by him to the debtor. Christmas's position is that there was no such transfer. Is it the plan agent's position that the transfer was some kind of gift as inferred by the circumstances, including Christmas's admissions in his statements and acts. See, e.g., *Skellinger v. England*, 81 Cal.App. 176, 253 P. 191 (1927). It seems to the court that the plan agent will have to show that there was a transfer by some means from Christmas to the debtor.

At trial, the court will receive live testimony from the plan agent and Christmas, who are subject to cross-examination.

Appearances are required on 1/6/22, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Prior tentative ruling as of 1/3/22. No tentative ruling on the merits. Appearances are required on 1/6/22, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Revised tentative ruling as of 12/15/21. After considering the moving and opposing papers, the court's tentative view is that application of the doctrines of judicial estoppel and judicial admission is problematic here because the party to the prior proceedings was not Christmas in his individual capacity, but the debtor. The court and the plan agent in discussing the matter in prior hearings have apparently conflated Christmas as debtor's representative and

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Christmas in his individual capacity, which was perhaps understandable because Christmas was the 100 percent shareholder and president of the debtor and his interests were aligned with the debtor in the preconfirmation phase of this case. Judicial estoppel applies to a party prevailing in a prior proceeding and taking advantage of a contrary position in a subsequent proceeding, see generally 1 Russell, Bankruptcy Evidence Manual, §6:1 (2019-2020 edition), but in this situation, the parties are different. The debtor was the party in the prior matter of the adequate protection motion, and Christmas in his individual capacity is the party in the adversary proceeding and in the contested matter of the plan agent's contempt motion. The court also preliminarily stated its tentative view that judicial estoppel was not applicable because the debtor/Christmas did not prevail on the adequate protection motion because the favorable ruling by this court on that matter was reversed on appeal, so there is no apparently inconsistent result to warrant the potential application of judicial estoppel, strictly speaking. See 1 Russell, Bankruptcy Evidence Manual, §6:1, citing and quoting inter alia, Moore v. United Services Auto. Ass'n, 808 F.2d 1147, 1153 (5th Cir. 1987) ("The judicial estoppel doctrine requires 'an affirmative position to have been taken by the party to be estopped and requires that the position to have been successfully maintained.'"). Whether or not the court has construed judicial estoppel too strictly may be a matter of controversy because parties in whatever capacity should not make contradictory statements based on what is to their advantage at a particular time in the case.

There are differences between judicial estoppel, judicial admission and evidentiary admission. See Minish v. Hanuman Fellowship, 214 Cal.App.4th 437, 448-459 (2013). The statements made in the Christmas's declaration in support of the debtor's adequate protection motion were made on behalf of the debtor, which was the party to the prior matter in this case, and not Christmas individually, and thus, may not be a judicial admission by him as the party in the prior proceeding. Whether or not the admissions made in the adequate protection motion or the bankruptcy schedules are considered made in a pleading may also be a subject of controversy because generally speaking, pleadings consist of a complaint, answer or other response to the complaint and pretrial statements. See Federal Rule of Civil Procedure 7. As to bankruptcy schedules, it is an open question in the Ninth Circuit whether or

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not the doctrine of judicial admissions applies to bankruptcy schedules. See *In re Barker*, 839 F.3d 1189, 1195 (9th Cir. 2016). Thus, the court has doubts about the applicability of the doctrine of judicial admission here.

However, Christmas's statements in debtor's filings in this case are evidentiary admissions because in whatever capacity, the statements were made against his interest in his individual capacity, that is, the posters were owned by the debtor, and not him. Nevertheless, as recognized in the case law, a party against whom an evidentiary admission is asserted has the right to show that the prior statements were inadvertently made or by mistake. *Minish v. Hanuman Fellowship*, 214 Cal.App.4th at 457. Accordingly, the court finds that it is proper for Christmas to have the opportunity in a contested evidentiary hearing to show that his prior evidentiary admissions were inadvertently made or mistaken. Thus, there appears to be a genuine factual issue regarding whether the prior admissions or the declaration assertions are the truth, which would necessitate an evidentiary hearing. Christmas asserts that the dispute regarding ownership of the posters should be resolved in the pending adversary proceeding, while the plan agent asserts that the court may summarily dismiss Christmas's statements without an evidentiary hearing and grant him declaratory relief that the debtor owns the posters. Given that the posters may be valuable as Christmas had attested in the adequate protection motion declaration that they were worth \$13 million, the court is not inclined to determine ownership without an evidentiary hearing because of due process concerns. See *Tyner v. Nicholson* (*In re Nicholson*), 435 B.R. 622, 635-637 (9th Cir. BAP 2010), abrogated on other grounds as recognized in *In re Tea Station Investment, Inc.*, No. 2:20-bk-14175 NB, 2021 WL 4988436 at *4 (Bankr. C.D. Cal. Oct. 26, 2021). As stated by the Bankruptcy Appellate Panel in *In re Nicholson*, "An evidentiary hearing is generally appropriate when there are disputed and material factual issues that the bankruptcy court cannot readily determine from the record. Thus, if a contested matter in a bankruptcy case 'cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held at which testimony of witnesses is taken in the same manner as testimony is taken in an adversary proceeding or at trial in a district court civil case.' Fed. R. Bankr.P. 9014, Advisory Committee Note to 2002 Amendment. This advisory committee note 'makes clear that this requirement is intended to require a trial

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when there is a genuine factual dispute.' " 435 B.R. at 636 (citation omitted).

Moreover, the court needs to resolve whether or not it may grant declaratory relief over ownership as part of the civil contempt proceedings instead of resolving ownership in the claims in the adversary proceeding. If so, the court would set an evidentiary hearing to resolve the contempt motion. Christmas's counterclaims for ownership of the posters for conversion, replevin and declaratory relief are noncore state law claims and require entry of final judgment by the district court as he has not consented to this court's jurisdiction to enter a final judgment. See *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25, 34 (2014).

It seems that the court can treat the posters dispute as a discrete litigation matter like the Banksy dispute and conduct a trial on that dispute. Discovery in the adversary proceeding involving Christmas's claims is now closed, and the factual evidence appears to be straightforward. The plan agent does not assert that discovery is needed as he contends that the matter can be decided on the papers. Christmas apparently relies on his testimony that he never transferred ownership of the posters to the debtor as he asserted in his declaration. In any event, the adversary proceeding, including Christmas's counterclaims, has been pending for years, and discovery is closed. The court could just set an expeditious evidentiary hearing since the factual issues appear to be straightforward. The court would dispense with a pretrial conference on the matter as there is no apparent need. The court would require the parties to file their witness and exhibit lists and optional trial briefs in advance of the trial. The trial could be scheduled as early as January 2022. Alternatively, the parties may waive the conduct of an evidentiary hearing and have the court decide the matter consisting of the plan agent's motion and Christmas's counterclaims. However, it appears to the court that while the plan agent will waive an evidentiary hearing, Christmas will not. The court will set a further status conference on 1/5/22 at 11:00 a.m. so the parties can confer on a date for the trial of this matter.

Appearances are required on 12/15/21 to discuss setting of an evidentiary hearing as appropriate, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

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Chapter 11

Party Information

Debtor(s):

Art and Architecture Books of the

Represented By

Thomas M Geher

David W. Meadows

Jerome S Cohen

Carolyn A Dye

Alan I Nahmias

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#2.00 TRIAL RE: Motion of Sam Leslie as plan agent under confirmed plan of reorganization for:

- (1) issuance of order to show cause for contempt against Douglas Christmas, an individual;
- (2) to compel Douglas Christmas to issue correspondence retracting letter dated October 27, 2021 addressed to Mr. Jeff Tanenbaum of Threesixty Asset Advisors as well as contents of October 27, 2021 email from Jonathan Shenson, Esq. to Carolyn A. Dye, Esq. and Victor A Sahn, Esq.; or in the alternative;
- (3) for order interpreting and enforcing terms and conditions of confirmation order on confirmed plan of reorganization of Official Committee of Unsecured Creditors; and
- (4) for sanctions against Douglas Christmas, individually including monetary sanctions
fr. 11-23-21, 12/15/21, 1/6/22

Docket 2661

Tentative Ruling:

Updated tentative ruling as of 1/12/22. See tentative ruling for matter no. 1.

Prior tentative ruling as of 1/3/22. No tentative ruling on the merits. Appearances are required on 1/6/22, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Prior tentative ruling as of 12/15/21. See tentative ruling for matter no. 3.

Prior tentative ruling as of 12/9/21. No tentative ruling on the merits. Appearances are required on 12/15/21 to discuss setting of an evidentiary hearing as appropriate, but counsel and self-represented parties must appear

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through Zoom for Government in accordance with the court's remote appearance instructions.

Prior tentative ruling as of 11/10/21. No tentative ruling on the merits. Appearances are required on 11/23/21, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Party Information

Debtor(s):

Art and Architecture Books of the

Represented By
Thomas M Geher
David W. Meadows
Jerome S Cohen
Carolyn A Dye
Alan I Nahmias

Movant(s):

Sam Leslie, Plan Agent

Represented By
Victor A Sahn
Asa S Hami
Carolyn A Dye
David J Richardson
Steven Thomas
Stephen Sorensen

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#3.00 TRIAL RE: order to show cause why Douglas Christmas should not be held in contempt of court for violations of the "order confirming second amended plan of reorganization of official committee of unsecured creditors" fr. 11-23-21, 12/15/21, 1/6/22

Docket 2665

Tentative Ruling:

Updated tentative ruling as of 1/12/22. See tentative ruling for matter no. 1.

Prior tentative ruling as of 1/3/22. No tentative ruling on the merits. Appearances are required on 1/6/22, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Prior tentative ruling as of 12/15/21. See tentative ruling for matter no. 3.

Prior tentative ruling as of 12/9/21. No tentative ruling on the merits. Appearances are required on 12/15/21 to discuss setting of an evidentiary hearing as appropriate, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Prior tentative ruling as of 11/10/21. No tentative ruling on the merits. Appearances are required on 11/23/21, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Party Information

Debtor(s):

Art and Architecture Books of the

Represented By
Thomas M Geher
David W. Meadows

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Jerome S Cohen

Carolyn A Dye

Alan I Nahmias

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Adv#: 2:15-01679 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF T v.

#4.00 TRIAL RE: First amended counter-complaint
against Art & Architecture Books of the 21st Century
fr. 1/6/22

Docket 640

Tentative Ruling:

Updated tentative ruling as of 1/12/22. See tentative ruling for matter no. 1.

Prior tentative ruling as of 1/3/22. No tentative ruling on the merits.

Appearances are required on 1/6/22, but counsel and self-represented parties must appear through Zoom for Government in accordance with the court's remote appearance instructions.

Party Information

Debtor(s):

Art and Architecture Books of the

Represented By
Thomas M Geher
David W. Meadows
Jerome S Cohen
Carolyn A Dye
Alan I Nahmias

Defendant(s):

Ace Gallery New York Corporation,

Represented By
Alan W Forsley

Douglas Christmas

Represented By
Jonathan Seligmann Shenson

Ace Gallery New York, Inc., a

Represented By
Alan W Forsley

ACE MUSEUM, a California

Represented By

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Art and Architecture Books of the 21st Century

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Alan W Forsley

400 S La Brea, LLC a California

Represented By
Michael W Vivoli
Ronald Rus
Fahim Farivar
Brian L Davidoff
Keith Patrick Banner

Jennifer Kellen

Represented By
J. Bennett Friedman

Michael D. Smith

Represented By
Brian L Davidoff
Keith Patrick Banner

Kamran Gharibian

Represented By
Brian L Davidoff
Keith Patrick Banner

Daryoush Dayan

Represented By
Brian L Davidoff
Keith Patrick Banner

Cathay Bank, a California

Represented By
Ekwan E Rhow
Elliot C Harvey Schatmeier

Jennifer Kellen

Represented By
Michael D Sobkowiak

Plaintiff(s):

THE OFFICIAL COMMITTEE OF

Represented By
Victor A Sahn
Daniel A Lev
David J Richardson
Asa S Hami
Jessica Vogel

Official Committee Of Unsecured

Represented By

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Art and Architecture Books of the 21st Century

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David J Richardson
Victor A Sahn

Sam Leslie

Represented By
Victor A Sahn
Carolyn A Dye
David J Richardson
Jason Balitzer
Steven Thomas
Stephen Sorensen